

*United States Court of Appeals
for the Second Circuit*

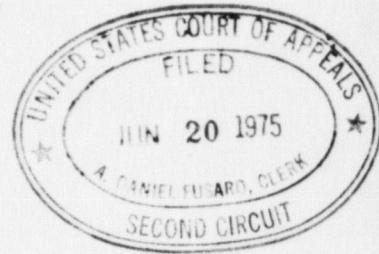


TRANSCRIPT

75-6033

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.



RICHARD LAMBERTSON,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.

P/S

TRANSCRIPT OF RECORD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK.

rec 6/16/75

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COMPLAINT

NORTHERN DISTRICT OF NEW YORK
U. S. DISTRICT COURT

RICHARD LAMBERTSON, :
Plaintiff :
vs. :
UNITED STATES OF AMERICA, :
Defendant :

The plaintiff complaining of the defendant respectfully alleges and says to the Court:

1. That plaintiff is a resident of the State of New York, County of Onondaga, and is a citizen of the United States of America.
2. That on or about August 30, 1972, at approximately 4 P.M. while the plaintiff was working for the Armour & Company firm at the receiving dock as a driver and unloader at Syracuse, New York, plaintiff was actively engaged in unloading beef from a piggy-back trailer to the receiving dock and eventually in to the Armour & Company plant, when, without any provocation or justification whatsoever, one William Boslet, a duly authorized meat inspector and an employee of the United States Department of Agriculture, who was on duty at the plant at the time and place aforementioned, and acting in the scope of his duty and his employment, when the said William Boslet pulled a navy blue wool stocking

cap over the plaintiff's eyes and ears and pushed the plaintiff into meat hooks, thereby causing severe injury to the plaintiff's mouth, head and teeth.

3. That on or about March 5, 1974, a corrected claim was mailed to the United States Department of Agriculture, Office of the General Counsel, Washington, D. C., with full documentation of said claim via medical and dental reports and a December 19,^{*} 1972 report by James W. Allen, Special Agent, Office of the Inspector General, United States Department of Agriculture.

4. That the said William Boslet, an employee of the United States Department of Agriculture and of the United States Government, did at the aforesaid time and place mentioned, negligently and/or wrongfully, while as a government employee and while acting within the scope of his employment, did injure the said Richard Lambertson all to his damage in the amount of Fourteen Thousand Dollars (\$14,000.00).

5. That on or about May 10, 1974 said United States Department of Agriculture, Office of the General Counsel has denied said claim.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of Fourteen Thousand Dollars (\$14,000.00), plus the costs and disbursements of this action.

ANTHONY F. ENDIEVERI,
Attorney for Plaintiff
Office & P.O. Address
5104 West Genesee Street
Camillus, New York 13031

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD LAMBERTSON,

Plaintiff

-vs-

AFFIDAVIT

UNITED STATES OF AMERICA,

Defendant

STATE OF NEW YORK) SS:
COUNTY OF ONONDAGA)

I, RICHARD LAMBERTSON, being duly sworn deposes and says:

1. That I am the plaintiff in this case against the United States of America for injuries inflicted upon me by one William Boslet, Meat Inspector for the United States Agriculture Department.
2. That attached is Schedule "A", a statement which I gave to Mr. James W. Allen, Special Agent of the Office of the Inspector General, United States Department of Agriculture, in relationship to my injury. That everything in same is the truth, and that I have made this statement voluntarily.
3. That the injuries inflicted upon me by William Boslet were not as a result of anything I did, were totally unwarranted, and in my opinion were totally unintentional on the part of William Boslet, and were the result of one-sided horseplay by William Boslet to me.

RICHARD W. LAMBERTSON

Sworn to before me by Anthony F. Endieveri this 6th day of Jan., 1975

SCHEDULE "A"

Syracuse, New York
December 19, 1972

I, Richard W. Lambertson, make the following statement freely and voluntarily to James W. Allen, who has identified himself to me as a Special Agent of the Office of the Inspector General, United States Department of Agriculture, knowing that this statement may be used in evidence.

I am 26 years old, married with five children, and reside at 341 Fitch Street, Syracuse, New York. I have been employed by Armour and Company, Syracuse, New York since December 1970 and my present position is driver and unloader. Presently my main duties at Armour and Company consist of unloading and shifting meat, poultry and eggs.

On August 30, 1972, at approximately 4:00 P.M. there was a piggy back trailer at the inner truck opening backed up to the Receiving Dock at Armour and Company. I went into the piggyback trailer pushing some meat hooks along the meat rail in preparation for unloading hind quarters of beef from the trailer to the receiving dock and eventually into the plant. I lifted off the meat rail in the piggyback trailer 2 or 3 long meat hooks and walked back onto the dock. These long hooks were too long for the beef in the trailer and I hung them up on the high meat rail on the north side of the receiving dock. After I had hung these long hooks on the meat rail, I was reaching up with my right hand to detach a bundle of short meat hooks suspended from this high meat rail with a pulley wheel on the rail. I was approximately 5 to 6 inches away from the hanging hooks. I had not made contact with the bundle of approximately 10 or

15 short meat hook and pulley assembly when I felt two hands on my head and my Navy blue wool stocking hat was pulled down over my eyes and both my ears. At the same time, I was pushed forward by a body into the meat hooks. I was surprised and shocked and I believe that I opened my mouth. I felt for a second some meat hooks making contact with my face. I immediately reared my head back after contacting the meat hooks and lifted my hat back on my head above my eyes. At this time I could taste blood and spit some out of my mouth. The next thing I know was that William C. Boslet, the United States Department of Agriculture Meat Inspector on duty at the plant was beside me. Boslet said to me, "I am sorry, I did not mean it." My mouth was in pain and felt as though I had a tooth ache. Then I proceeded to the ladies lavatory in George Bouchard's office. There I rinsed my mouth with water and cleaned my face that was covered with grease. The ache in my mouth was in the gums on the upper left side. I noticed also while in the ladies' lavatory that I could feel a tooth loss on the left side of my mouth in the upper gum. I saw that I had broken in half three of my upper teeth on the left side and that the left center upper tooth had a crack in it. I returned to the Receiving Dock and showed George Bouchard, my supervisor the gap in the upper left side of my mouth where the three teeth were broken off. The inside of my mouth bled for approximately twenty minutes and then stopped. Approximately twenty-five minutes after the accident, I went home.

I did have prior to the accident all my upper teeth. They were not perfect but they would have lasted me another year or

year and a half before I would lose them.

Prior to the accident we were talking and joking with one another. On the dock at the time of the accident was Boslet, the meat inspector, and two of my co-workers, Kenneth Palmer and Joseph Cardone. George Bouchard was in the piggyback trailer supervising the unloading of beef from this trailer.

I had known Boslet several weeks or since he started inspectional duties at my plant. I got along very well with this man and there was no friction or ill feeling between us. I respect Boslet and consider him a good associate. I am not angry with Boslet because of this accident. I did however, think that it was very peculiar that he behaved in such a manner by pulling my hat over my eyes and climbing on my back like a grizzly bear. I know that a receiving dock in a meat plant is a very dangerous place and there should be no bodily contact or fooling around where workers could bump into each other.

On August 31, 1972, I visited Dr. Joseph G. Reidel, a medical doctor, at his office at 509 West Onondaga Street, Syracuse, New York. My upper gum on the left side was still sore and bleeding. Dr. Reidel gave me some pills to alleviate the pain and prescribed rinsing my mouth with a peroxide and water mixture. He also recommended that I see a dentist soon.

Approximately three days after this accident, I visited Dr. Michael W. Fallon, a dentist, in his office at 823 Loew Building, Syracuse, New York. Dr. Fallon examined me and recommended that all my upper teeth be extracted as soon as possible. He prescribed some pills to stop the infection in my mouth.

On September 20, 1972, I was admitted to St. Joseph's Hospital

Health Center, 301 Prospect Avenue, Syracuse, New York. On September 21, 1972, all my upper teeth were extracted at this hospital. On September 22, 1972, I was discharged from this hospital.

Shortly after my hospital stay I made an appointment to see Dr. Robert L. Morgan, a dentist, located at 2102 West Genesee Street, Syracuse, New York. I made several visits to Dr. Morgan during October and November 1972. On December 10, 1972, Dr. Morgan had an upper plate ready to be fitted to me. He inserted this plate and I have been wearing it to the present time.

For approximately three months after the accident I was bothered with puss sacks in the upper gum on my left side. This infection was very sore and continuous. Dr. Fallon had given me penicillin pills which I took faithfully to stop the infection. These puss sacks would burst every few days and continue to form. The gum on the upper left side of my mouth is healing, however, it is still sensitive and a little sore.

I was away from my job from August 30, 1972, the day of the accident, through November 5, 1972. On November 6, 1972, I returned to work and have been on duty continuously since that time.

I have read this statement consisting of 4 typewritten pages and it is true and correct. I have signed on the last page each and every page and have been given an opportunity to make any corrections or additions.

Witness:

James W. Allen, Special Agent
Office of the Inspector General
United States Department of Agriculture
Room 1707, 26 Federal Plaza
New York, New York 10007

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD LAMBERTSON,	:	
		Plaintiff
vs.	:	AFFIDAVIT
UNITED STATES OF AMERICA,	:	
		Defendant

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

I, ANTHONY F. ENDIEVERI, being duly sworn, deposes and says:

1. That I am an attorney at law licensed in the State of New York, and have an office for the practice of law at 5104 West Genesee Street, Camillus, New York. That I am also admitted to the United States District Court, Northern District of New York, United States of America, Second Circuit, and the Supreme Court of the United States of America.

2. That based on my interviews and analysis and preparation in this case, on information and belief, the injuries to my client were not a result of an assault or an assault and battery, but were a result of some unwarranted, unintentional, one-sided horseplay on the part of William Boslet, Meat Inspector for the United States Department of Agriculture.

ANTHONY F. ENDIEVERT

Sworn to the 6th day of Jan., 1975.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD LAMBERTSON, :
Plaintiff :
vs. :
UNITED STATES OF AMERICA, :
Defendant :
STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

I, GEORGE BOUCHARD, being duly sworn, deposes and says:

1. That I am supervisor at the Armour & Company plant, Syracuse, New York.
2. That on or about August 30, 1972 at approximately 4:00 P.M., I was supervising the unloading of a piggyback trailer at the receiving dock of my employer, the Armour & Company, Syracuse, New York.
3. The following employees were under my supervision at the time, unloading the truck: Richard Lambertson, Kenneth Palmer, and Joseph Cardone.
4. That at the time and place aforesaid mentioned, one William Boslet, a meat inspector for the United States Department of Agriculture, conducted himself in the following manner in relationship to Richard Lambertson; in the first place, Mr. Boslet impresses me as an immature individual with not enough maturity for his position. As Richard Lambertson was proceeding to unload some beef from the trailer to the receiving dock and eventually to

the plant, William Boslet jumped at Richard Lambertson, saying "boo!" and then pulled Richard Lambertson's woolen hat over his eyes and ears, and climbing on his back, riding him piggyback style, and negligently and carelessly pushing the said Richard Lambertson into some meat hooks, injuring Richard's teeth and face.

5. That after the incident, William Boslet apologized, saying he was just playing around and having some fun, and did not mean to hurt Richard Lambertson.

6. That in my opinion, based on the fact that I saw the incident from start to finish with my own eyes, as well as what I heard during and afterwards, these actions by William Boslet to Richard Lambertson definitely were not an assault or an assault and battery, but were the result of some one-sided horseplay on the part of William Boslet to the victim, Richard Lambertson, unwarranted and unintentional.

GEORGE BOUCHARD

(Sworn to by Anthony F. Endieveri, Jan. 6, 1975.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD LAMBERTSON, :
Plaintiff :
vs. : AFFIDAVIT
UNITED STATES OF AMERICA, :
Defendant :

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:
)

I, KENNETH PALMER, being duly sworn, deposes and says:

1. That I am employed at the Armour & Company plant,
Syracuse, New York.

2. That on or about August 30, 1972 at approximately 4:00
P.M. I was assisting in the unloading of a piggy back trailer at
the receiving dock of my employer, the Armour & Company, Syracuse,
New York.

3. That at the time and place aforesaid mentioned, one
William Boslet, a meat inspector for the United States Department
of Agriculture, conducted himself in the following manner in re-
lationship to Richard Lambertson; in the first place, Mr. Boslet
impresses me as an immature individual with not enough maturity
for his position. As Richard Lambertson was proceeding to unload
some beef from the trailer to the receiving dock and eventually to
the plant, William Boslet jumped at Richard Lambertson, saying
"boo!" and then pulled Richard Lambertson's woolen hat over his
eyes, and ears and climbing on his back, riding him piggyback style,
and negligently and carelessly pushing the said Richard Lambertson

into some meat hooks, injuring Richard's teeth and face.

4. That after the incident, William Boslet apologized, saying he was just playing around and having fun, and did not mean to hurt Richard Lambertson.

5. That in my opinion, based on the fact that I saw the incident from start to finish with my own eyes, as well as what I heard during and afterwards, these actions by William Boslet to Richard Lambertson definitely were not an assault or an assault and battery, but were the result of some one-sided horseplay on the part of William Boslet to the victim, Richard Lambertson, unwarranted and unintentional.

KENNETH E. PALMER

Sworn to before me by Anthony F. Endieveri, this 6th day of January, 1975.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK-----:
RICHARD LAMBERTSON,

Plaintiff :

vs. :

UNITED STATES OF AMERICA,

Defendant :

-----:
STATE OF NEW YORK)
COUNTY OF ONONDAG.) SS:

I, JOSEPH CARDONE, being duly sworn, deposes and says:

1. That I am employed at the Armour & Company plant, Syracuse, New York.
2. That on or about August 30, 1972 at approximately 4:00 P.M., I was assisting in the unloading of a piggy back trailer at the receiving dock of my employer, Armour & Company, Syracuse, New York.
3. That at the time and place aforesaid mentioned, one William Boslet, a meat inspector for the United States Department of Agriculture, conducted himself in the following manner in relationship to Richard Lambertson; in the first place, Mr. Boslet impresses me as an immature individual with not enough maturity for his position. As Richard Lambertson was proceeding to unload some beef from the trailer to the receiving dock and eventually to the plant, William Boslet jumped at Richard Lambertson, saying "boo!" and then pulled Richard Lambertson's woolen hat over his eyes and ears, and climbing on his back, riding him piggy-back

style, and negligently and carelessly pushing the said Richard Lambertson into some meat hooks, injuring Richard's teeth and face.

4. That after the incident, William Boslet apologized, saying he was just playing around and having fun, and did not mean to hurt Richard Lambertson.

5. That in my opinion, based on the fact that I saw the incident from start to finish with my own eyes, as well as what I heard during and afterwards, these actions by William Boslet to Richard Lambertson definitely were not an assault or an assault and battery, but were the result of some one-sided horseplay on the part of William Boslet to the victim, Richard Lambertson, unwarranted and unintentional.

JOSEPH CARDONE

Sworn to before me by Anthony F. Endieveri this 6th day of Jan., 1975.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD LAMBERTSON, :
Plaintiff :
vs. :
UNITED STATES OF AMERICA, : NOTICE OF MOTION
Defendant : CIVIL NO. 74-CV-422
:

S I R:

PLEASE TAKE NOTICE that upon the annexed affidavit of George H. Lowe, Assistant United States Attorney, sworn to on December 11, 1974, and upon all the pleadings and proceedings heretofore had herein, an application, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, will be made to this Court at a Motion Term, to be held at the Federal Courthouse, Syracuse, New York, on January 13, 1975, at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order dismissing the complaint on the grounds of lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted.

Dated: Syracuse, N.Y.

December 11, 1974.

Yours, etc.,

JAMES M. SULLIVAN, JR.
United States Attorney
Federal Post Office Building
Syracuse, New York 13201

GEORGE H. LOWE

TO:ANTHONY F. ENDIEVERI
5104 West Genesee St.
Camillus, N.Y.

By:

George H. Lowe,
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

RICHARD LAMBERTSON

v.

UNITED STATES OF AMERICA

)
)
) Civil No. 74-CV-422
)
)

DEFENDANT UNITED STATES OF
AMERICA'S MEMORANDUM OF LAW

The Defendant United States of America submits this memorandum of law, and the moving affidavit of George H. Lowe, Assistant United States Attorney, sworn to on December 11, 1974, in support of its application, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, for an order dismissing the complaint on the grounds of lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted.

THE ACTION

Paragraph 2 of the complaint herein, a copy of which is annexed to the Lowe Affidavit, alleges that William Boslet, an employee of the defendant, "pulled a navy blue wool stocking cap over the plaintiff's eyes and ears and pushed the plaintiff into meat hooks, thereby causing severe injury to the plaintiff's mouth, head and teeth." The affidavits in opposition to this application of George Bouchard, Kenneth Palmer, and Joseph Cardone, all sworn to on January 6, 1975, all contain the following statement: ". . . William Boslet jumped at Richard Lambertson, saying "boo!", and then pulled Richard Lambertson's woolen hat over his eyes and ears, and climbing on his back, riding him piggy-back style, and negligently and carelessly pushing the said Richard Lambertson into some meat hooks, injuring Richard's teeth and face." These meat hooks were "5 to 6 inches away" from the plaintiff when Boslet committed the foregoing acts. See Schedule A, page 1, attached to the plaintiff's affidavit in opposition.

DISCUSSION

THE CLAIM HEREIN CONSTITUTES A
BATTERY, AND A SUIT BASED UPON
IT AGAINST THE UNITED STATES
THEREFORE IS BARRED

In Gardner v. United States, 446 F.2d 1195, 1197
2nd Cir., 1971), the Court of Appeals stated:

. . . it is dispositive that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued, . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." . . . A federal court has no jurisdiction of a suit against the federal government unless its consent to be sued is affirmatively established by statute.

Under Federal Torts Claim Act, Title 28, United States Code, Section 2671, et seq., the Government has waived, on certain specific terms, its traditional immunity to suit. Section 2680 of Title 28, however, provides certain exceptions and limitations to this waiver. In particular, Section 2680(h) provides, in part:

The provisions of this chapter . . . shall not apply to -

. . . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

In Jayson, Personal Injury, Handling Federal Tort Claims, Vol. 2, §260.02, "battery" is defined as follows:

A battery is an unconsented and unprivileged touching of another's person by the actor, or by something put in motion by him, down with the intention of inflicting a harmful or offensive contact, or apprehension thereof.

In Prosser Law of Torts, Ch. 2, §9, at page 32, it is stated:

The gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff. The defendant may be liable where he intended only a joke

It appears to be beyond dispute, based upon the complaint and the affidavits in opposition of the plaintiff, Bouchard, Palmer, and Cardone, that Boslet intended to touch or come in contact with the plaintiff, i.e., to pull his cap down over his head and to jump on his back, and that the plaintiff did not consent to this action. The fact that the plaintiff's face then came in contact with meat hooks that were five or six inches away clearly was a direct consequence of Boslet's touching or coming in contact with the plaintiff.

It is respectfully submitted, therefore, that the plaintiff's claim herein arises out of an alleged battery, and that as a result suit based upon the claim against the United States is barred.

CONCLUSION

The motion to dismiss the complaint should be granted.

Respectfully submitted,

JAMES M. SULLIVAN, JR.
United States Attorney

BY

George H. Lowe
Assistant United States Attorney
Federal Building
Syracuse, N.Y. 13201

Dated: Syracuse, New York

January 9, 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD LAMBERTSON,)
vs.)
UNITED STATES OF AMERICA,)
Defendant)

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

AFFIDAVIT

CIVIL NO. 74-CV-422

GEORGE H. LOWE, being duly sworn, deposes and says:

1. I am an assistant to James M. Sullivan, Jr., United States Attorney for the Northern District of New York, and attorney for the defendant in the above-entitled action. I am responsible for the conduct of this litigation on behalf of the defendant.

2. I submit this affidavit in support of an application, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, for an order dismissing the complaint on the grounds of lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted.

3. Annexed hereto as Exhibit A is a copy of the complaint herein. Although not explicitly stated in the complaint, it appears that subject matter jurisdiction is based upon Title 28, United States Code, Sections 2671, et seq. The allegedly tortious conduct described in paragraph "2" of the complaint constitutes an assault and battery. Any claim against the

United States based upon such conduct therefore is barred by Title 28, United States Code, Section 2680, which provides in part:

The provisions of this chapter . . .
shall not apply to -

• • • •
(h) Any claim arising out of assault,
battery, false imprisonment, false
arrest, malicious prosecution, abuse
of process, libel, slander, misrepre-
sentation, deceit, or interference
with contract rights.

WHEREFORE, deponent respectfully requests that an order be entered dismissing the complaint herein.

GEORGE H. LOWE

(Sworn to by Ora W. Theard, December 11, 1974.

NORTHERN DISTRICT OF NEW YORK
U. S. DISTRICT COURT

RICHARD LAMBERTSON, :
Plaintiff
vs.

UNITED STATES OF AMERICA, :
Defendant :

The plaintiff complaining of the defendant respectfully
alleges and says to the court:

1. That plaintiff is a resident of the State of New York, County of Onondaga, and is a citizen of the United States of America.
2. That on or about August 30, 1972, at approximately 4 P.M. while the plaintiff was working for the Armour & Company firm at the receiving dock as a driver and unloader at Syracuse, New York, plaintiff was actively engaged in unloading beef from a piggy-back trailer to the receiving dock and eventually in to the Armour & Company plant, when, without any provocation or justification whatsoever, one William Boslet, a duly authorized meat inspector and an employee of the United States Department of Agriculture, who was on duty at the plant at the time and place aforementioned, and acting in the scope of his duty and his employment, when the said William Boslet pulled a navy blue wool stocking cap over the plaintiff's eyes and ears and pushed the plaintiff into meat hooks, thereby causing severe injury to the plaintiff's mouth, head and teeth.
3. That on or about March 5, 1974, a corrected claim was mailed to the United States Department of Agriculture, Office

of the Inspector General, United States Department of Agriculture.

4. That the said William Boslet, an employee of the United States Department of Agriculture and of the United States Government, did at the aforesaid time and place aforementioned, negligently and/or wrongfully, while as a government employee and while acting within the scope of his employment, did injure the said Richard Lambertson all to his damage in the amount of Fourteen Thousand Dollars (\$14,000.00),

5. That on or about May 10, 1974 said United States Department of Agriculture, Office of the General Counsel has denied said claim.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of Fourteen Thousand Dollars (\$14,000.00) plus the costs and disbursements of this action.

ANTHONY F. ENDIEVERI
Anthony for Plaintiff
Office & P.O. Address
5104 West Genesee Street
Camillus, New York 13031

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK-----
RICHARD LAMBERTSON,

Plaintiff

AFFIDAVIT

vs.

UNITED STATES OF AMERICA,

Defendant

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

I, RICHARD LAMBERTSON, being duly sworn, deposes and says:

1. That I am employed by Armour & Company, Syracuse, New York.
2. That before August 30, 1972, and on several occasions I saw and witnessed one William Eoslet, a meat inspector for the United States Department of Agriculture at the Armour & Company indulge in one-sided horseplay with myself and co-workers of the following:

- (A) Goosing the men when bending over.
- (B) Pushing and joking.
- (C) Laughing like hell at a big joke when there was nothing to laugh at.
- (D) Climbing on boxes and jumping off in order to scare the men, and this type of behavior, which I would consider horseplay.

RICHARD LAMBERTSON

Sworn to before me by Anthony F. Fndieveri
this 6th day of February, 1975.

Notary Public

LEGAL MEMORANDUM

Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent. Goodrum v. State, 60 Ga.511.

A willful and unlawful use of force or violence upon the person of another. Long v. Rogers, 17 Ala. 540. An unlawful touching of the person of another by the aggressor himself, or any other substance put in motion by him. Kirkland v. State, 43 Ind. 153, 13 Am. Rep. 386; Commonwealth v. Remley, 257 Ky. 209 77, S.W. 2d 784. The consummation of an unlawful assault. State v. Hamburg, Del., 143 A. 47, 48. The slightest touching of another, or of his clothes or anything else attached to his person if done in a rude, insolent, or angry manner. Booher v. Trainer, 172 Mo. App. 376, 157 S.W. 848, 850; Commonwealth v. Gregory, 132 Pa. Super. 507, 1 A.2d 501, 503.

The actual offer to use force to the injury of another person is Assault; the use of act is battery, which always includes an assault; hence the two terms are commonly combined in the term "assault and battery". Harris v. State, 15 Okl. CR. 369, 177 P. 122, 123.

A surgical operation is a technical "battery" regardless of its result, and is excusable only when there is express or implied consent by the patient. Bonner v. Moran, 126 F. 2d 121, 122, 75 U. S. App. D.C. 156, 139 A.L.R. 1366.

ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE.
An unlawful act of violent injury to the person of another, accompanied by circumstances of aggravation, such as the use of deadly weapon, great disparity between the ages and physical conditions of the parties, or the purposeful infliction of shame and disgrace. State v. Jones, 133 S.C. 167, 130 S.E. 747, 751.

Simple Battery. One not accompanied by circumstances of aggravation, or not resulting in grievous bodily injury.

Assault and Battery

To constitute an assault there must be (1) an intentional and unwarranted attempt to contact the body of the plaintiff; and (2) an act tending toward such contact, together with (3) the real or apparent present ability to do harm; and (4) a resulting fear on the part of the plaintiff.

Battery

Defined- A harmful or offensive touching of the person of the plaintiff or of something closely associated with the person, intentionally caused, directly or indirectly, by the defendant. Baldinger v. Banks, 201 N.Y.S. 2d 629 (1960)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK-----
RICHARD LAMBERTSON,

Plaintiff

vs.

AFFIDAVIT

UNITED STATES OF AMERICA,

Defendant

STATE OF NEW YORK) SS:
COUNTY OF ONONDAGA)

JOSEPH CARDONE, being duly sworn, deposes and says:

1. That I am an employee of Armour & Company, Syracuse, New York.
2. That prior to August 30, 1972 and on several occasions I saw and witnessed one William Boslet, a meat inspector for the United States Department of Agriculture at the Armour & Company, indulge in one-sided horseplay with me and co-workers of the following:
 - (A) Goosing the men when bending over.
 - (B) Pushing and joking.
 - (C) Laughing like hell at a big joke when there was nothing to laugh at.
 - (D) Climbing on boxes and jumping off in order to scare the men and this type of behavior, which I would consider to be horseplay.

JOSEPH CARDONE

Sworn to before Anthony F. Endieveri the 6th day of February, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

RICHARD LAMBERTSON

)

vs.

: Civil No. 74-CV-422

UNITED STATES OF AMERICA

)

DISCUSSION

POINT 1.

THIS CLAIM AND THIS SUIT
AGAINST THE UNITED STATES IS NOT BARRED.

Under the Federal Torts Claim Act. Title 28, United States Code, Section 2680 (h) states:

"Any claim arising out of assault, battery, false imprisonment, slander, misrepresentation, deceit, or interference with contract rights: provided, that, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising on or after the date of the enactment of this provision out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law."

Where Air Force "flying boxcar" type plane made two unauthorized, playful passes at court house, at nearly level flight at very low altitude, and disintegrated and crashed, causing injuries to bystanders, conduct of crew was not an assault and battery, within provision of subsection (h) of this section excepting claims arising out of an assault and battery, in view of the fact that no witness had stated that he took shelter or saw any one else to do, or that he was in fear for his personal safety, and that several

had stated that they went outside or to a window to get a better view C.A. Tenn. 1956, 236 F 2d. 649, 74 A.L.R. 2d 860 motion denied 77 S. Ct. 862, 353 U.S. 956, 1 L.Ed.2d 907, certiorari dismissed 78 S. Ct. 6, 355 U.S. 801, 2 L.Ed.2d 19, USCA 28 Section 2680(h) United States Code Service Title 28 Section 1346 (b)

"Subject to the provisions of chapter 171 of this title 2671-2680 of this title), the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damage, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of an employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." (my emphasis)

Camper attacked by bear in national park while in sleeping bag at night could recover damages from government for injuries sustained where he was told by ranger that there was no danger from bears though bears had attacked camp just a few days before. (1951) Claypool v. DC-Cal.), 98 FSupp 702.

Where government failed to maintain life guard at swimming pool, and failed to maintain an attendant who was familiar with operation of suction pump, government was liable for drowning of sailor while on leave, as result of arm being drawn into pipe by suction pump. (1951) Brown v. U.S., (DC-WVa), 99 FSupp 685.

Government is liable where soldier on official duty in army car drives into rear of parked car, though visible for half mile. (1952) Poston v. U.S., (DC-KY), 101 FSupp 904.

United States was liable for negligence of its employee hunter is setting out device for destruction of coyotes, by which devise plaintiff was injured. (1954) Worley v. U.S., (DC-Ore.), 119 FSupp 719.

United States, furnisher of scaffold used by painting contractor's employees in painting government property, was guilty of negligence in permitting the use of a scaffold which was 12 years old and had deteriorated to such extent that it was not safe for the use for which it was intended and was liable for death of contractor's employee proximately caused by its negligence. (1958) Magias v. U.S., (DC-Pa.), 167 FSupp. 482.

United States was liable in damages for death of ten-year-old child who, while invitee in national park was fatally injured while wading or swimming in a pool of water in the park, by being struck on the head by a boy swinging over the pool on a rope swing affixed to a limb overhanging the pool. (1965) Afams v. U.S., (DC-Okla), 239 FSupp 503.

Naval hospital was negligent in allowing inexperienced corps Wave to come in contact with premature baby and also in not giving her complete physical examination before she started working in the premature nursery, and government is liable for injuries suffered by baby from a staphylococcus infection. (1965) Kapuschinsky v. U.S., (DC-SC), 248 FSupp 732.

POINT 11

BY NEW YORK LAW THE DEFENDANT IS
LIABLE TO THE PLAINTIFF FOR NEGLIGENCE

"Ordinary negligence is the failure to use the ordinary care

that a reasonable, prudent and vigilant man will use, in other-words, the want of ordinary care." N.Y. Negligence Bender Vol. 1, Section 3.04, page 165.

"Ordinary care is the care which a reasonable, prudent and vigilant person will use in the conduct of his own affairs under the circumstances that exist." Payne v. City of N.Y. 277 N.Y. 393 (1938); Braman-Johnson Flying Service vs. Thompson 167 Misc. 167 (1938); Scott vs. Deleware L & W R.R. 222 App Div 409 (1928: Mangam v. Brooklyn City C.C. 98 A m Dec. 66, 1868. And see also Restatement of the Law of Torts, Vol. 2 Sec. 283. ID Sec 202 p 61.

Ordinary care must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect. It must be commensurate with known dangers. Caldwell v Island Park, 304 NY 268, 107 NE2nd 441. Sadowski v. Long Island R. Co. 292 NY 488, 55 NE2d 497. Hagarty v Railway Express Agency (Sup) 126 NYS2d 107, affd 282 AD 871, 124 NYS2d 924. Central Greyhound Lines v Bonded Freightways, 193 Misc 320, 82 NYS2d 671. Radin v State, 197 Misc 247, 80 NYS2d 189. Braman-Johnson Flying Service v Thompson, 167 Misc 167, 3 NYS 2d 602.

The risk reasonably to be perceived defines the duty to be obeyed. Storm v N.Y. Tel. Co. 270 NY 103, 200 NE 659.

A man placed in a responsible position must guard against a risk of danger to others where a reasonable foresight would suggest a good chance of occurrence and reasonable care suggests steps in avoidance. McPartland v State, 277 AD 103, 98 NYS2d. 665.

The performance of the duty of ordinary care often requires the exercise of a very high degree of care when that is necessary to be commensurate with danger apparent or to be apprehended and guarded

against. O'Brien v New York R Co. 185 AD 867, 174 NYS 116.

CONCLUSION

The motion to dismiss the complaint should be denied.

Respectfully submitted,

ANTHONY F. ENDIEVERI
Attorney for Plaintiff
Office & P.O. Address
5104 W. Genesee Street
Camillus, New York 13031

Dated: Syracuse, New York
February 7, 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORKRICHARD LAMBERTSON,
Plaintiff

vs.

74-CV-422

UNITED STATES OF AMERICA,
Defendant

EDMUND PORT, Judge

APPEARANCES:ANTHONY F. ENDIEVERI, ESQ.
5104 West Genesee Street
Camillus, New York 13031
Attorney for PlaintiffJAMES M. SULLIVAN, JR.,
United States Attorney
Federal Building
Syracuse, New York 13201
Attorney for DefendantGEORGE H. LOWE
Assistant U.S. Attorney
of CounselORDER

The Defendant, United States of America, having moved for an order dismissing the complaint on the grounds of lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted, and the matter having come on to be heard on February 10, 1975 and the court having considered matters outside the pleadings, it is

ORDERED, that the defendant's motion be and the same hereby is granted as a motion for summary judgment; and it is further

ORDERED, that judgment be entered herein dismissing the complaint of the plaintiff for lack of subject matter jurisdiction and for failure to state claim.

EDMUND PORT

United States District Judge

Dated: February 12, 1975
Auburn, New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD LAMBERTSON,

74-CV-422

Plaintiff

vs.

UNITED STATES OF AMERICA,

NOTICE OF APPEAL

Defendant

Notice is hereby given that RICHARD LAMBERTSON, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the Order of United States District Judge Edmund Port, granting the defendant's motion for a summary judgment dismissing the complaint of the plaintiff for lack of subject matter jurisdiction and for failure to state a claim, entered in this court on the 14th day of February, 1975.

Dated: February 26, 1975.

Anthony F. Endieveri
Attorney for Plaintiff
Office & P.O. Address
5104 West Genesee Street
Camillus, New York 13031

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

RICHARD LAMBERTSON,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Fed. #75-6033

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

STATEMENT

The plaintiff, Richard Lambertson, appeals from the decision of the Hon. Edmund Port, dismissing the complaint on the 14th day of February, 1975.

The action was brought against the defendant to recover damages for personal injuries by reason of the alleged negligence of the defendant at the Armour and Company Plant, Syracuse, New York. Said action was brought pursuant to the Federal Tort Claims Act.

A motion for summary judgment was made by the defendant and was heard on the 13th day of January, 1975, and on the 10th day of February, 1975. The Court granted the motion for summary judgment and dismissed the summons and complaint herein.

THE FACTS

The plaintiff, while working for Armour and Company, was injured by William Boslet, a meat inspector for the United States Department of Agriculture.

The injury was caused by William Boslet's jumping out and yelling "boo" and then jumping on and riding "piggy-back" the plaintiff, pulling the plaintiff's stocking cap over his eyes, resulting in plaintiff coming in contact with some meat hooks, at the meat packing plant.

As a result of the occurrence aforementioned, which took place on August 30, 1972, the plaintiff commenced an action for the sum of Fourteen Thousand Dollars to recover for personal injuries.

The defendant sought summary judgment pursuant to Rule 12-b of the Federal Rules of Civil Procedure and cited the following grounds upon which this motion was based:

1. Lack of jurisdiction to subject matter; and
2. The complaint failed to state a claim upon which relief can be granted;
3. Plaintiff's action arose out of an alleged battery.

After argument of said motion, the lower court determined that the plaintiff's claim arose out of an assault.

POINT I

THE PLAINTIFF'S STATUS IS SUCH THAT HE MAY RECOVER UNDER THE FEDERAL TORT CLAIMS ACT.

Title 28 of the United States Code, § 1346(b) provides as follows:

Subject to the provisions of chapter 171 of this title (Sections 2671-2680 of this title) the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (my emphasis)

The defendant had contended that the plaintiff falls within a certain category of persons who are precluded from recovery for damages under the Federal Tort Claims Act. In support of this contention, it cited in the lower court *Gardner v. United States*, 446 F. 2d 1195. (C.A. 2d Cir. 1971) and also hornbooks dealing with the definition of battery. The defendant did not discuss assault.

POINT II

THE UNITED STATES IS LIABLE TO THE PLAINTIFF UNDER THE LAW OF NEW YORK.

Negligence in New York is essentially lack of care. Intent is an element where assault is concerned. It is not an action for negligence. *LaPlante v. Johnson* 163, Misc. 961, 1937 aff'd. 225 App. Div. 248 3d Dept. 1938.

POINT III

PLAINTIFF'S ACTION IS NOT BARRED BY SECTION 2680(h).

The Federal Tort Claims Act of 1946 was designed to avoid

injustice to meritorious claims barred before by sovereign immunity and to eliminate the burden of private bills.

United States v. Muniz, 83 S. Ct. 1850, 1853 (1963).

The Federal Tort Claims Act was enacted to promote the interests of justice, but its most important purpose was to dispense with the ancient and archaic idea that the sovereign government could do no wrong, "the old idea on the Continent 'that the King can do no wrong', will be abandoned here in the United States, and the people of the United States will be able to secure justice from their government." 66 Cong. Rec. 2087, Rep. Underhill.

The provisions of this chapter and Section 1346(b) of this title shall not apply to-

- (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, liable, slander, misrepresentation, deceit, or interference with contract rights.

The Legislative intent as to what the government was seeking to exclude; was when some agent of the government gets in a fight with some fellow and "socks" him. *Panella v. United States*, 216 F. 2d. 622, 626, C.A. 2, rev'd. 117 F. Supp. 119 (1954).

It is respectfully submitted that the Congress was seeking to exclude out and out fights such as in *Collins v. United States*, 259, F.Supp. 363, (1966) when an employee of the Post Office "socked" the plaintiff there. The facts in the

instant case are critical. The plaintiff, by having his cap pulled over his eyes was not aware of where he was going or what was happening. At this point, with an employee of the United States Department of Agriculture riding "piggy-back" upon the claimant a "technical" assault may have occurred but it is respectfully submitted there is no intentional wrong.

A legislative history touching §2680(h) suggests the belief that Congress wished to avoid exposure to claims grounded upon the impulsive and "hot-headed" actions of employees. *Lane v. United States*, 225 F. Supp. 850, 851 (1964).

In *Lane v. United States*, *Supra*, the government was held liable for the acts of its surgeon who, while operating, mistakenly operated on the right knee instead of the injured left knee of a patient. It was held that there was no intentional wrongful act on the part of the operating surgeon in cutting into the wrong knee and the court concluded that § 2680(h) is inapplicable, despite a 'technical' assault occurring.

It is respectfully submitted that there was no intentional wrong on the part of the government's employee and despite the 'technical' assault the intent of Congress in passing this legislation should be considered.

By enactment of the act the public was at long last

given a remedy against the government for its negligent acts. The aged and outmoded idea that "The King can do not wrong" has been overcome to afford the public justice. It is hoped that this right and remedy will not be whittled down by strained traditional interpretation.

CONCLUSION

- (1) The status of the plaintiff is such that he can maintain the action herein.
- (2) The law of New York would permit recovery.
- (3) The instant action is one that is not barred by § 2680(h).

Respectfully submitted,

ANTHONY F. ENDIEVERI,
Attorney for Plaintiff-Appellant.